

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THERESA HOOVER,

Plaintiff and Appellant,

v.

RITA SAENZ, as Director, etc.,

Defendant and Respondent.

A101661

(San Francisco County
Super. Ct. No. CPF-02-500681)

Theresa Hoover appeals orders denying her petitions for a writ of mandate pursuant to Code of Civil Procedure sections 1094.5 (administrative mandate) and 1085 (ordinary mandate). The administrative mandate petition sought to set aside a decision of the California Department of Social Services (DSS) denying Hoover's application for an exemption that would have allowed her to work in a licensed community care facility, despite her criminal record. (Health & Saf. Code, § 1569.17.)¹

The ordinary petition for mandate sought to compel the DSS to promulgate regulations defining the criteria the DSS uses to determine whether an applicant for an exemption is "of such good character as to justify . . . granting an exemption" (§ 1569.17, subd. (f)(1).) The court denied both petitions, and Hoover filed a timely appeal. We shall affirm.

¹ All subsequent statutory references are to the Health and Safety Code, unless otherwise indicated.

FACTS

Theresa Hoover began working at Cherish Manor, a DSS licensed care facility for the elderly, in July 2000, while she was participating in a drug rehabilitation program at the New Life House of Hope. On October 12, 2000, the DSS notified the Cherish Manor licensee, Mary Kane, that, based upon Hoover's criminal history, Hoover must be excluded from the facility unless she obtained an exemption. Kane applied for an exemption on Hoover's behalf, but the exemption was denied. The Notice of Denial of Exemption stated: "The primary concern of this Department is the health and safety of clients served. To justify granting an exemption, the Department must have substantial and convincing evidence to support a reasonable belief that the person is of good character. The information provided with the request did not convince us that this standard was met."

Hoover exercised her right to appeal the decision, and a de novo hearing was held on September 13, 2001, before an administrative law judge (ALJ). The DSS submitted documentary evidence that Hoover had been convicted of six misdemeanor offenses and one felony between 1988 and 1999. These convictions were as follows: (1) a 1988 misdemeanor conviction of petty theft; (2) a 1988 misdemeanor conviction of writing checks with insufficient funds; (3) a 1990 misdemeanor conviction for petty theft; (4) a 1990 misdemeanor conviction of possession of methamphetamine; (5) a 1993 misdemeanor conviction of petty theft with a prior; (6) a 1997 misdemeanor conviction of possession of paraphernalia; and (7) a 1999 felony conviction of possession of methamphetamine. With respect to the 1999 conviction, Hoover was placed on probation for three years. The term of her probation was to expire on November 2, 2002.

Hoover testified that she was 35 years old, and began using methamphetamine when she was 18. She had been addicted to methamphetamine for 15 to 17 years. Her habit initially cost approximately \$50 a day, and eventually escalated to a cost of between \$100 and \$150 a day. Her use of methamphetamine led to the commission of crimes because she "had to do whatever [she] could to get [her] drugs." Throughout the entire period of her addiction, she also intermittently sold methamphetamine to support her

habit, and later also to support her child. She could not remember all the details of her arrests and convictions, because she was too high at the time.

With respect to the most recent conviction in 1999 for felony possession of a controlled substance, Hoover testified that she was living with an elderly man who dealt methamphetamine. A police officer observed her, through a window, measuring methamphetamine. She was measuring the drugs for the dealer because he was drunk and she wanted him to leave her and her son alone. The police officer came to the door, told her what he saw, and obtained permission to search the apartment, but did not immediately arrest her. Fearing that she would lose her son, who was then three years old, Hoover checked herself into Harvest House, a residential drug and alcohol treatment program. Not satisfied with the physical condition of the facility, and the lack of structure, Hoover voluntarily decided to place herself, together with her child, in another residential treatment program, New Life's House of Hope. The program at New Life's House of Hope was highly structured. For the first 30 days Hoover was not permitted to see family or friends, and was prohibited from leaving the property unless accompanied by staff. The days are filled with classes and job assignments, and the residents must also care for their children.

She obtained more freedom as she progressed through the first year of the program. In January of 2000, she was allowed to start taking some classes at Shasta College, where she was learning to do medical transcription and hoped either to work from home, or in a hospital billing department. In May of 2000, she moved into the transitional housing program, where she continued to live in September 2001, at the time of the administrative hearing. In the transitional housing, she had more freedom, and was allowed to work. There was still 24-hour supervision, and a manager made sure the residents attended Bible study and met with mentors. Hoover was devising a plan to live independently, but wanted to wait until she could get two evictions removed from her credit record. She continued to be subject to random drug tests, and always tested clean.

In July of 2000, she was hired for a part-time job at Cherish House. Her duties included assisting residents in the bathroom, preparing meals, housekeeping, charting

residents' activities and dispensing medications, including stimulants. Her employer considered her to be completely trustworthy and a kind and loving caregiver. After she was told she could no longer work at Cherish House because of her criminal record, she started working part time for Good News Rescue Mission, helping homeless people relocating to the Redding area. She wanted her son to be proud of her, and did not intend to go back to her former lifestyle.

Hoover's probation officer, Chelsey Lynn Chapelle, also testified that Hoover consistently tested negative for drug use, and that she was highly motivated to make the necessary changes in her life. In light of her success in the first two years of probation, her probation officer put her on the "overload list," which permits her to write in once a month, instead of meeting with her probation officer.

Pastor William Roscoe, the director of the Good News Rescue Mission, which also ran the New Life drug and alcohol recovery program that Hoover was participating in, also testified on her behalf. He testified that only about 40 percent of the people who enroll in the program finish it, but that 75 percent of those who graduate have maintained sobriety for six months after graduation. He also testified that clients with criminal records, lack of high school education, few job skills, and a social network consisting of other addicts have a high recidivism rate. The younger a person is when first addicted, and the longer the length of use, especially if it is for more than five years, the greater the possibility of relapse. Another indication of relapse is use of tobacco, which Pastor Roscoe described as a "gateway" drug. He acknowledged that Hoover was still under supervision and drug testing, and subject to mandatory meetings in the transitional housing, and that there was no way to predict whether she would continue on course once she began living independently. Nevertheless, she was highly motivated by the changes in her child to avoid relapse, she had a good support base of sober and responsible people, and was continuing to be a responsible employee of the homeless resource center also run by Good News Rescue Mission. He felt confident she was "on a solid recovery path" and intended to stay there.

Based upon the foregoing evidence, the ALJ issued a proposed decision, which was adopted by the DSS, excluding her from employment at Cherish Manor and denying the requested exemption. The ALJ found that Hoover had suffered seven convictions in eleven years, the most recent of which was a felony for which she was still on probation. She had been addicted to methamphetamine for more than 15 years. The ALJ also recognized all of Hoover's accomplishments since entering the recovery program, including her attendance of college classes, her successful employment, and her move to transitional housing. Nevertheless, the ALJ concluded: "It cannot possibly be found at this early stage of her rehabilitation that substantial and convincing evidence exists to support a reasonable belief that respondent is of such good character as to justify granting an exemption. Such evidence does not yet exist. Respondent has had a long and entrenched history of methamphetamine abuse. It has dominated her life. Since May 1999 respondent has been under the control of a supervised 24-hour a day drug abuse recovery program. She has also been under the control of the Shasta County Probation Department. Her criminal probation will not terminate until November 2, 2002. Respondent has no track record of being crime and drug free, based on her own internal controls. She is still subject to the external controls of her rehabilitation program and her criminal probation. She cannot prove that she can remain drug and crime free on her own, because she had not yet been on her own. [¶] The evidence does indicate that [Hoover] is a changed person. However, she is a changed person in a structured environment. The time [Hoover] had spent in her rehabilitation program is only the beginning of the rehabilitation process. Substantial and convincing evidence that [Hoover] is of such good character as to justify granting an exemption requires much more evidence of a successful history of crime and drug free behavior free of the external compulsion [Hoover] is still subject to. It requires a successful history while subject to only normal social proscription."

I.

Administrative Mandate

A. Statutory Framework

In order to protect the vulnerable populations cared for in facilities licensed by the DSS, such as children, the elderly, the chronically ill, and the disabled, the Legislature has declared that all persons who work in care facilities licensed by the DSS must submit to a criminal background check. (§§ 1522, subd. (a)(1); 1568.09, subd. (a)(1); 1569.17, subd. (a)(1); 1596.871, subd. (a)(1).) A person who has suffered criminal convictions must be excluded from working in a licensed care facility unless he or she applies for and obtains an exemption from the director of the DSS. (§§ 1522, subd. (g)(1); 1568.09, subd. (f)(1); 1569.17, subd. (f)(1); 1596.871, subd. (f)(1).) Section 1569.17, subdivision (f)(1), which specifically applies to licensed facilities for care of the elderly, provides that “the director may grant an exemption from disqualification . . . if the director has substantial and convincing evidence to support a reasonable belief that the applicant . . . [is] of such good character as to justify . . . granting an exemption.”

At the time of the administrative hearing, California Code of Regulations, title 22, section 87219.1² set forth the following criteria the DSS shall apply in determining whether to grant an exemption:

- (1) The nature of the crime;
- (2) Period of time since the crime was committed and number of offenses;
- (3) Circumstances surrounding the commission of the crime that would demonstrate the unlikelihood of repetition;
- (4) Activities since conviction, such as employment or participation in therapy or education that would indicate changed behavior;
- (5) Granting by the Governor of a full and unconditional pardon;
- (6) Character references;

² These regulations have since been revised and amended. The revised regulations were filed on July 14, 2003, became operative on July 16, 2003. (Cal. Reg. Notice Register 03, No. 30-Z, p. 1131.)

(7) A certificate of rehabilitation from a superior court;
(8) Evidence of honesty and truthfulness as revealed in exemption application documents.

(9) Evidence of honesty and truthfulness as revealed in exemption application interviews and conversations with DSS.

A person who is excluded because of his or her criminal record, and denied an exemption, must be given written notice of the basis for the action, and the right to an appeal conducted in accordance with the Administrative Procedures Act. (§ 1569.58, subds. (b) & (e).)

B. Standard of Review

Hoover's application for an exemption did not involve a "vested" right, because, due to her criminal record, she is statutorily disqualified to work in a licensed facility *unless* the DSS grants an exemption. (§ 1569.17, subd. (f)(1); *Bixby v. Pierno* (1971) 4 Cal.3d 130, 146 [an administrative decision involves a vested right to practice a trade or profession that is subject to de novo review in the trial court only when the individual *has already been determined by the agency to be qualified, and it subsequently acts to revoke it*]; see also *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 823, 825.) As the reviewing court, whether the trial court applied the de novo standard, or reviewed the factual findings for substantial evidence, we must uphold the decision "unless it lacks substantial evidentiary support, or infringes upon the applicant's statutory or constitutional rights. (*Bixby v. Pierno*, at p. 146, fns. omitted; see also *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785-1786.)³

³ Hoover's reliance upon cases such as *Jenron Corp. v. Department of Social Services* (1997) 54 Cal.App.4th 1429, 1434, is misplaced because the administrative proceeding under review in *Jenron* concerned grounds for *revocation* of a license to run adult residential care facilities that DSS had already determined the petitioner was qualified to hold. In those circumstances, the administrative proceeding concerned revocation of a vested right.

C. Substantial Evidence

The decision denying Hoover's application for an exemption is supported by substantial evidence: At the time of the administrative hearing, Hoover was still on probation for her most recent conviction for a felony, and she had a long history of recidivism, consisting of seven convictions in eleven years. By her own admission, during a 15-year addiction, starting as a teenager, she would do almost anything to get drugs, and did so even after her son was born. In the last two and a half years, she had made significant changes in her life, including getting a job, taking classes, maintaining sobriety, and living a law-abiding life. Nevertheless, although she had been able to transition into a less restrictive program, and her probation officer had recently determined that she could be placed on the "overload list," which meant she only had to report in writing on a monthly basis, the evidence was uncontradicted that she had not had the experience of, or established any track record of, remaining drug- and crime-free in a completely unrestricted setting. Even Pastor Roscoe, who was confident that Hoover would ultimately be successful, acknowledged that Hoover was still under supervision and drug testing, and subject to mandatory meetings in the transitional housing, and that there was "no way" to predict whether she would continue on course once she began living independently.

Based upon these findings, and weighing the 11-year history of criminality, and the related approximately 15-year addiction, against the commendable, but comparatively short-lived, two-and-a-half-year period of sobriety and crime-free life while still under strict supervision, the ALJ reasonably concluded that Hoover was not sufficiently rehabilitated to warrant granting an exemption to permit her to work with a vulnerable elderly population in a licensed care facility.

Hoover's challenge to the sufficiency of the evidence in support of the finding that she had not yet established a successful history of living drug- and crime-free in an unrestricted setting is unavailing. It consists primarily of arguing that more weight should have been given to evidence of the progress she had already made, or that different inferences should have been drawn regarding her continued voluntary residence

in transitional housing and the implications for her ultimate successful recovery when she does transition to an unrestricted setting. For example, she asserts that her voluntary decision to remain in transitional housing supports the inference that she will be less likely to relapse when she does make the transition to an unrestricted setting, and that her progress so far in the recovery program demonstrated that she had already defied the odds against successful recovery. The ALJ clearly recognized all of Hoover's commendable efforts, but nevertheless was free to assign greater weight to the entrenched history of criminal recidivism and drug abuse, and to draw the contrary inference that, in the absence of an established track record of remaining drug- and crime-free in an unrestricted setting, the risk of relapse was too high to warrant granting an exemption at this relatively early stage in the recovery and rehabilitation process.

D. Due Process

Hoover also contends the decision denying her the exemption must be set aside because a series of procedural errors in the administrative proceeding under review resulted in a denial of a fair trial, and of substantive and procedural due process. (Code Civ. Proc., § 1094.5, subd. (b).)

1. Use of "Subregulations" to Deny the Exemption

Hoover argues that her substantive and procedural due process rights were violated because the ALJ, and the DSS in its initial denial, relied upon DSS guidelines, manuals, and policies that were not promulgated in accordance with the Administrative Procedures Act (Gov. Code, § 11340 et seq.) or made generally available to the public. (See, e.g., *California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 504, 532 [reversing summary judgment in favor of Department of Health Services, on ground that there were triable issues of fact with respect to claims that Department's informal enforcement policies and manuals were "subregulations" that the Department could not rely upon unless they were promulgated in accordance the Administrative Procedures Act].) She further contends that these "subregulations" include a conclusive presumption, which she argues is not reasonably related to any legitimate public purpose, that a person who has suffered four or more misdemeanor

convictions must wait at least four years after completion of probation to even be considered for an exemption. (But see *Lopez v. McMahon* (1988) 205 Cal.App.3d 1510, 1518-1520 [this court rejected a substantive due process challenge to a statute disqualifying applicant for an in-home child care license who resides with certain classes of felons, and *permanently* precluding such felons from eligibility for an exemption based upon “good character,” because the exclusion was rationally related to the legislative purpose of protecting children in a licensed home day care facility].)

We need not address any of her due process arguments for setting aside the decision that are premised upon the alleged use of a “subregulation” or an irrebuttable presumption because the record does not support her contention that the administrative decision was based upon the DSS guidelines, manuals, or procedures. The hearing before the ALJ was a *de novo* determination of whether Hoover had to be excluded from the facility based upon her record of criminal convictions, and whether she should be granted an exemption. It therefore is irrelevant whether the “subregulations” were used by the DSS in its initial denial. As Hoover acknowledges, the ALJ expressly ruled that his decision would not be based upon the DSS manuals, guidelines, or procedures, and refused to admit them into evidence on the grounds that they were irrelevant.

Hoover nevertheless suggests that the ALJ must secretly have relied upon these excluded documents because the only way to explain the ALJ’s denial of the exemption, despite all of the evidence of her current “good character,” is that he relied upon the presumption that she could not be rehabilitated until four years had elapsed since the completion of probation. To the contrary, the ALJ’s decision reflects an individualized analysis and a balancing of all of the relevant factors set forth in the then-existing applicable regulations, only one of which was the length of time since Hoover’s last conviction. (Former Cal. Code of Regs., tit. 22, § 87219.1, subd. (e)(2).) The ALJ also clearly based his decision on the number, frequency, and increasing seriousness of her convictions, her own testimony concerning the relationship between her methamphetamine use and criminal recidivism, and the evidence that, despite her very commendable progress, she had not yet demonstrated she could remain crime-free and

drug-free in an *unrestricted setting*, because she had not yet had *any* experience in such a setting. If, as Hoover suggests, the denial was based upon a “subregulation” consisting of a conclusive presumption that a person with four or more convictions is ineligible for an exemption until four years have elapsed between last conviction or completion of probation, then it would have been entirely unnecessary for the ALJ to discuss and weigh these other factors.

2. Adequate Notice

Hoover also contends that she was not given adequate notice of the issues to be resolved in the hearing, because the accusation consisted “merely of charges phrased in the language of” the applicable statute. (Gov. Code, § 11503 [accusation shall not state charges in statutory language].) Government Code section 11503 “establishes the constitutionally required notice to the accused of the standards by which the accused’s conduct is to be measured.” (*Smith v. State Bd. of Pharmacy* (1995) 37 Cal.App.4th 229, 241.)

The accusation did phrase the charges in terms of the applicable statutory language. The purpose of Government Code section 11503, however, is not to impose technical pleading requirements, but rather *to enable the accused to prepare a defense*. (*Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 306-307.) A technical defect is of no consequence if Hoover was “in fact able to prepare [her] defense after reading the accusation.” (*Rolfe v. Munro* (1958) 165 Cal.App.2d 726, 730.) Nothing in the transcript indicates that Hoover was caught by surprise regarding any of the evidence presented or the issues argued. She marshaled the best possible case that she was on the path to rehabilitation, and intended to remain crime-free and drug-free even when she transitioned to an unrestricted setting. That it was not enough to persuade the ALJ that she should be granted an exemption is not attributable to any lack of notice that actually hampered her defense, but rather to the immutable fact that she had not yet established a track record of remaining crime-free in an unrestricted setting. (See *Rolfe v. Munro*, at p. 730 [accusation that used statutory language to state charges did not establish

inadequacy of notice for purposes of due process where record showed no surprises or actual detrimental effect on presentation of defense].)

3. Vagueness of “Good Character” Standard

Hoover also contends that the “good character” standard applied to an application for an exemption (§ 1569.17, subd. (f)(1)) is unconstitutionally vague because it gives the DSS unlimited and arbitrary discretion to decide who receives the exemption, and violates her substantive due process rights because the “good character” standard is not rationally related to the statutory purpose of prohibiting the presence in licensed care facilities of “individuals whose contact with clients of residential care facilities for the elderly may pose a risk to the clients’ health and safety.” (§ 1569.17.)

The courts have long recognized that the application of a “good character” or analogous standard by an administrative agency authorized to issue licenses to practice a regulated profession does not confer unfettered and arbitrary discretion, nor is such a standard “unconstitutionally vague, indefinite or uncertain.” (*Goldberg v. Barger* (1974) 37 Cal.App.3d 987, 991-992 [court rejected a constitutional challenge to denial of a life and disability insurance agent’s license based upon a finding that the applicant lacked a “good business reputation”].) “[S]tatutory standards such as ‘honesty,’ ‘good character’ and ‘good business reputation’ are not vague. . . . [Nor do they invest the agency] with unbridled discretion to deny a license on the basis of rumor, innuendo and surmise.” (*Id.* at p. 992.)⁴

The requirement of substantial and convincing evidence of good character in order to grant an exemption pursuant to section 1569.17, subdivision (f)(1) is also rationally related to the statutory purpose of identifying persons who have records of criminal convictions who may pose a threat to the health and safety of the elderly residents of a licensed care facility, and excluding them from such facilities. In *Lopez v. McMahon*,

⁴ We see no analogy between this case and *Wheeler v. State Bd. of Forestry* (1983) 144 Cal.App.3d 522, upon which Hoover relies. *Wheeler* involved *revocation* of a license, based upon charges of “gross incompetence,” which was not defined by any regulations, and involved an accusation that did not notify *Wheeler* he was charged with incompetence.

supra, 205 Cal.App.3d at pages 1518-1520, this court rejected a substantive due process challenge to a related statute that disqualified an applicant for an in-home child care license who resided with certain classes of felons, and which *did not* provide for an exemption based upon “good character.” We found the categorical exclusion of persons who resided with certain classes of felons, *without regard to evidence of rehabilitation*, was rationally related to the purpose of protecting children from any potential threat of harm. The statutory provision at issue here is even more narrowly drawn, because it does permit Hoover to demonstrate, in accordance with the statutory standard of “good character,” that despite the record of criminal convictions, she is sufficiently rehabilitated so as not to pose a risk to the population the statute is designed to protect.

4. Burden of Proof

Hoover also contends that she was denied due process because the ALJ erroneously placed the ultimate burden of proof upon her instead of upon the Department. (See § 1569.58, subd. (e) [in an administrative hearing concerning action by the DSS to exclude a person who has a record of criminal conviction, and has been denied an exemption, “the burden of proof shall be on the department”].)

It is unnecessary to distinguish each of the cases she cites for the proposition that it violates due process to shift the burden of proof in a disciplinary action to the accused because the record simply does not support her contention that the burden of proof was placed upon her. The prehearing conference order does refer to shifting the “burden of proof” to Hoover, once the DSS met its burden of proving her record of convictions, and that it had denied her request for an exemption. The order, however, simply reflects the common imprecise use of the phrase “burden of proof” to refer to a shift in the “burden of producing evidence” (Evid. Code, §§ 110, 550) from one party to another, irrespective of who bears the burden of proof, in the sense of the ultimate burden of persuasion. (Evid. Code, § 115.) In this context, it was entirely proper to shift the burden of production to Hoover, either because, by the terms of section 1569.17, Hoover’s record of criminal convictions created a rebuttable presumption that she should be excluded from licensed care facilities unless there was substantial and convincing evidence of her

good character to justify and exemption (Evid. Code, §§ 603, 604), or because she was in a better position to know the facts relevant to her “good character.” (Evid. Code, § 602.)

E. Violation of the American with Disabilities Act and Government Code section 11135

Finally, Hoover contends that the ALJ’s decision must be set aside because it is based upon her status as a drug addict, in violation of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12132) and Government Code section 11135, and therefore “the respondent has not proceeded in the manner required by law.” (Code Civ. Proc., § 1094.5, subd. (b).)

In *Thompson v. Davis* (9th Cir. 2002) 295 F.3d 890, the Ninth Circuit held that prisoners who have had an addiction to drugs, but are not current drug abusers, have a disability within the meaning of the ADA, and cannot be *categorically* excluded from eligibility for parole based upon their status as drug addicts. The court, however, also expressly recognized that the ADA did not preclude consideration of the history of substance abuse, in an *individualized* assessment of the prisoner’s suitability for parole. (*Id.* at p. 894.)⁵ Denial of Hoover’s application for an exemption does not violate the ADA because Hoover was not categorically disqualified *based upon her addiction*, but rather she was disqualified based upon her *record of criminal convictions*. (See *id.* at p. 897 [an essential element of a claim under the ADA is that the claimant was denied a benefit, or excluded, based upon a disability].) Moreover, in denying the exemption, the ALJ engaged in an individualized assessment of the relationship between her drug addiction and her record of criminality and of the risk of recidivism, and denied the exemption based upon her own admission that the two were closely related, the long history of criminality, and the absence of any track record of remaining drug- and crime-

⁵ “The parole board claims to have and undeniably does have legitimate penological interests in considering the plaintiffs’ substance abuse backgrounds during the individualized inquiry for parole suitability. We hold only that plaintiffs may state a claim under Title II based on their allegations that the parole board failed to perform an individualized assessment of the threat they pose to the community by categorically excluding from consideration for parole all people with substance abuse histories.” (*Thompson v. Davis, supra*, 295 F.3d 890, 894.)

free in an unstructured setting. The ADA does not preclude consideration of the relationship between Hoover's past drug addiction and her record of criminality and assessment of the risk of recidivism. (*Id.* at p. 894.)

II.

Ordinary Mandate

Hoover's petition pursuant to Code of Civil Procedure section 1085 asserted that the DSS had a present ministerial duty to promulgate new regulations setting forth the criteria it applied to applications for criminal record exemptions. It was undisputed that the DSS had already promulgated regulations that were in effect at the time of her request for an exemption. Nevertheless, Hoover contended that the DSS had been using "subregulations" to clarify its policies, had itself recognized the need to revise its regulations, but had not yet done so. She therefore sought an order directing the DSS "immediately to commence the process of promulgating regulations setting forth clear and objectively ascertainable standards for granting and denying criminal history exemption requests."

The court denied the petition because the DSS presented evidence that it was already in the process of a comprehensive revision of its regulations, and anticipated promulgating revised regulations by the end of December 2002. It is well established that a writ of mandate should not issue under Code of Civil Procedure section 1085 if the respondent is willing to perform the act without the coercion of the writ. " '[I]f the respondent shows a willingness to perform without coercion, the writ may be denied as unnecessary; and if he shows actual compliance, the proceeding will be dismissed as moot.' " (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 59.) The court therefore properly denied the petition on the grounds that there was no "actual controversy."

Moreover, while this appeal was pending, we granted a request for judicial notice of the revised regulations, which were filed on July 14, 2003. (Cal. Reg. Notice Register 03, No. 30-Z, p. 1131.) Hoover asserts that the issuance of the emergency regulations does not moot her appeal because the new regulations do not "specifically relate to the fitness of the criminal history exemption applicant for the specific position," and are not

“rationally related to the determination of whether the applicant’s presence in a licensed residential care facility for the elderly would pose a risk to the health and safety of the clients.” She does not support this broad assertion with any legal argument. Nor does she specify which of the revised regulations suffer from the alleged defects. This court therefore treats the issue as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794.)

CONCLUSION

The orders denying the petitions for mandate are affirmed.

Stein, Acting P.J.

We concur:

Swager, J.

Margulies, J.